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IN THE

Supreme Court of the United States

October Term, 1970.

No. 446.

TRIPOLI COMPANY, INC.,

Petitioner,

v.

WELLA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondent

DAVID S. MALIS,
305 Six Penn Center Plaza,
Philadelphia, Pa. 19103,
Counsel for Respondent.

Of Counsel:
MALIS, TOLSON & MALIS

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent respectfully prays that the Supreme Court deny a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above matter on April 27, 1970.

OPINIONS BELOW.

The opinion of the District Court is reported at 286 F. Supp. 264 (1968), and is printed in the Appendix to the petition at page A22 thereof. The opinion of the Court of Appeals is unreported as yet and is printed in the Appendix to the petition at page A2 thereof.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1970. The jurisdiction of this Court was invoked by petitioner under 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED.

1. Does the refusal of a manufacturer of hair preparations to sell a wholesaler who deliberately resells products to the general public intended for safety reasons to be used by licensed personnel only violate the Antitrust statutes?

2. Did the District Court err in granting summary judgment to defendant manufacturer which ceased selling to distributor who, on deposition, admitted selling inherently dangerous commodities to general public in violation of Federal Food & Drug Administration Act?

STATUTORY PROVISIONS INVOLVED.

1. Petitioner belatedly relies on the Sherman Antitrust Act, 15 U.S.C. 1 (1964). Respondent denies its applicability.

2. Federal Rule of Civil Procedure 56(b) reading:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

COUNTERSTATEMENT OF THE CASE.

The respondent is the manufacturer of fifty-two hair and cosmetic products, of which all but two are sold to wholesale distributors for resale to professional beauticians only. On the containers in bold print is a legend prohibiting the sale of the fifty products to other than professional beauticians, in accordance with the requirements of the Federal Food and Drug Act. The packaging made it abundantly clear that the dealer was not allowed to sell these products to anybody excepting a licensed professional beautician.

The other two products, not chemically dangerous, are sold in different containers and different colored packages to drug stores and their use is not so restricted.

Petitioner filed a complaint in the District Court alleging it had done business with the defendant for a number of years, and that defendant had discontinued sales to the plaintiff allegedly because of plaintiff's price cutting. Defendant filed a full and responsive answer setting forth that plaintiff's sales to the general public of potentially dangerous products intended for professional use only exposed defendant to F.D.A. and public liability.

On deposition, defendant's witnesses stated directly and bluntly that the sole and only reason for discontinuing dealing with the petitioner was the undenied fact that the general public was invited to plaintiff's establishment to purchase defendant's products required to be applied only by professional users.

It was also made perfectly clear that harm could result to an unskilled user of these products, thereby imposing liability on the manufacturer.

At no time was there any effort made by the plaintiff to demonstrate or introduce any evidence in the case at all that the refusal to continue to deal was based upon a restriction on price resale. None of the containers of these various products restricted for resale to professional customers had on it any price or suggested price. There was no attempt to prove that the dealers who purchased our products were to ask or charge any specific price. Plaintiff had in answer to its interrogatories a list of 17 dealers in this Philadelphia area to whom we sold our products for resale by those dealers to professional users. Not one of those dealers was called by the plaintiff to establish either that there was a suggested price or a fixed price or that any attempt at sanction was suggested. In short, plaintiff abandoned that theory.

Plaintiff's president, however, admitted on deposition that he ignored the warning labels, and freely advertised and sold defendant's professional products to the general public.

Defendant sought and obtained summary judgment.

ARGUMENT.

I. THE ISSUE HERE IS APPLICABLE ONLY TO THESE LITIGANTS.

The issue before the Court in the present case is uniquely limited to the specific parties based upon this particular set of facts and cannot by any stretch of contrived semantics be converted into a matter of constitutional application wanting review by this Court.

The question which petitioner seeks to have reviewed is simply a result of the unique set of facts involved in the litigation, and the admissions wrung from plaintiff's chief executive on deposition. Since all the facts were exposed on deposition and plaintiff sought vainly to show only that defendant harbored an *unexpressed intent* to fix prices, the matter was perfectly suited for summary judgment.

Thus, we submit, the matter is of little moment nationally, and is ill founded for consideration by the Supreme Court. Rule 19, Supreme Court Rules, *Graver v. Linde*, 336 U. S. 271, 275.

The decision in the instant case is hardly in conflict with *United States v. Arnold Schwinn & Co.*, 388 U. S. 365 (1967), as asserted by petitioner. As pointed out by the majority of the Court of Appeals, the restraint complained of was clearly *in the public interest*, and required by the F. D. A. Imagine a manufacturer's dilemma were the Court to have

held otherwise. In no way can judicial pronouncements regarding sales of bicycles become precedent for regulated procedures controlling the distribution of dangerous drugs and cosmetics applied to the human head.

Thus, we submit, there is no conflict between *Schwinn* and the instant case, since they are factually inapposite, and there is no reason to consider the controversy further.

II. THE DECISION OF THE COURT BELOW WAS EMINENTLY CORRECT.

(a) The plaintiff failed to plead or support a cause of action. In spite of its fatally defective pleading, the District Judge reviewed the entire record with a broad generous interpretation, but found nothing to carry the plaintiff to trial. After exhaustive discovery by deposition of defendant's personnel, plaintiff was unable to supply a single shred of support to its naked assertion in the complaint that the *unexpressed animus* of the defendant in refusing to deal further was that of price fixing.

Not one of the other distributors was deposed by plaintiff, nor its affidavit produced to affirm plaintiff's belief. No conspiracy was alleged or shown, nor could plaintiff itself assert an actionable course of communication or conduct. The issue groaned to a halt when plaintiff admitted its sales to the public of clearly restricted commodities.

Thus assuming it legal to sell dynamite to a building supply house, the manufacturer would be sore distressed to find the distributor selling it indiscriminately to the general public for use in tree stump removal.

There is no doubt that plaintiff petitioner, by reselling to non-professionals exposed the public to danger, and the defendant to products liability litigation.

FRUMER & FRIEDMAN, 3 Products Liability (1967 Supp. pp. 80, 81).

Helene Curtis v. Pruitt, 385 F. 2d 841 (C. A. 5th), *cert. denied*, 391 U. S. 913 (1968).

Kassad v. Central Soya Corporation, 432 Pa. 217 (1969).

(b) *The refusal to deal unaccompanied by any conspiracy or attempted monopolization or any price fixing is still the right of the manufacturer.* This petitioner had no contract of any kind or character with defendant which was breached by the defendant. It was merely a case of discontinuance of dealing based solely upon the fact that this dealer by his conduct was imposing a potential liability upon the manufacturer by the sale of products without adhering to the restrictions on the containers, and which sale admittedly could cause injury to a non-professional.

Quinn v. Mobil Oil Co., 375 F. 2d 273 (C. A. 1), *cert. denied* 389 U. S. 801 (1967).

(c) *There was no issue of fact to be determined by the lower Court.* Summary judgment was appropriate because:

(1) There was no attempt to support his complaint in any way.

(2) There was no attempt to deny the fact that petitioner was selling our dangerous merchandise for public consumption contrary to the restrictions imposed upon them for the safety of the public and, indirectly, the manufacturer.

CONCLUSION.

The conflict between *Schwinn* and *Tripoli* being illusory, or, more aptly, non-existent, and the plaintiff having failed to exhibit a shred of support for its faintly asserted suspicions, the holdings below were clearly correct.

We respectfully urge the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DAVID S. MALIS,
Counsel for Respondent.

Of Counsel:
Malis, Tolsen & Malis,
305 Six Penn Center Plaza,
Philadelphia, Pa. 19103.